

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

THE DETROIT FREE PRESS, INC.,

and

7-CA-42292

THE NEWSPAPER GUILD OF DETROIT,  
LOCAL 22, THE NEWSPAPER GUILD,  
AFL-CIO,

Amy J. Roemer, Esq. and Dynn Nick, Esq.,  
for the General Counsel.  
Jeffrey K. Ross, Esq., of Chicago, Illinois  
for the Respondent.  
John G. Adam, Esq., of Southfield, Michigan  
for the Charging Party.

DECISION

Statement of the Case

ERIC M. FINE, Administrative Law Judge. This case was tried in Detroit, Michigan on July 31, and August 1, 2000. The charge was filed by The Newspaper Guild of Detroit, Local 22, The Newspaper Guild, AFL-CIO (herein Guild Local 22). The complaint alleges that on June 9, 1999,<sup>1</sup> certain discriminatorily discharged and locked out employees of the Detroit Free Press, Inc., (herein the Respondent), including Chris Manoleas, represented by Guild Local 22 and certain other labor organizations, concertedly engaged in a demonstration at the Detroit Metropolitan Airport protesting unfair labor practices of the Respondent. The complaint further alleges that on July 16, the Respondent discharged Manoleas because of the union and protected activities he engaged in on June 9, and as a pretext to maintain its previous unlawful discharge of Manoleas on September 24, 1996, which is currently the subject of unfair labor practice proceedings in Case No. 7-CA-39526, and that by such conduct the Respondent violated Section 8(a)(3) and (1) of the Act.

On the entire record,<sup>2</sup> including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Guild Local 22, and the Respondent, I make the following

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<sup>1</sup> All dates are in 1999 unless otherwise indicated.

<sup>2</sup> The official transcript of the proceedings is hereby amended as follows:  
Page 152, line 11 where it states JUDGE FINE is changed to read MR. ROSS:

## FINDINGS OF FACT

## I. JURISDICTION

5 The Respondent, a corporation, has engaged in the operation of the news and editorial departments of a daily newspaper at its facility in Detroit, Michigan, where it annually receives gross revenues in excess of \$200,000, and it purchases and receives at its facilities in Michigan products directly from points outside the state. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Guild Local 22 is a labor organization within the meaning of Section 2(5) of the Act.

## II. Alleged Unfair Labor Practices

## A. Background

15 The Respondent is a subsidiary of Knight-Ridder Newspaper, Inc., and the Detroit News, Inc., (herein the News) is a subsidiary of Gannett Newspapers, Inc. The Detroit Newspaper Agency d/b/a Detroit Newspapers (herein DNA) was organized as a result of a partnership between the Respondent and the News and their parent corporations. The Respondent and the News maintain separate news and editorial operations. However, the DNA handles the printing, production, advertising, circulation and human relations for both of the newspapers. Guild Local 22 participated in a six union strike against the DNA, the News, and the Respondent beginning on July 13, 1995, involving approximately 2,000 employees.<sup>3</sup> The striking Unions made an unconditional offer to return to work in February 1997.<sup>4</sup>

25 Chris Manoleas worked for the Respondent as an editorial assistant beginning in 1989, but was not called back to work since his participation in the July 1995 strike.<sup>5</sup> Manoleas is a member of Guild Local 22 and has held several positions for that union, including: being a member of its governing body; serving as a steward; and serving on its bargaining committee. Manoleas on occasion attended contract negotiations, on behalf of Guild Local 22, also attended by Robert McGruder, the Respondent's executive editor, and Tim Kelleher, the vice-president of labor relations for the DNA. Kelleher served as the chief spokesman for the Respondent during the negotiations. It was McGruder, after consultation with Kelleher and others, who made the decision to discharge Manoleas based on his June 9 activities.

35 Manoleas credibly testified that following the Union's unconditional offer to return to work in February 1997, there remained an ongoing labor dispute between Guild Local 22, the five other striking unions, and the DNA, the News and the Respondent. At the time of the hearing in this case, the parties had still not reached a collective-bargaining agreement and the Unions were asking people to boycott the papers by not purchasing, reading, advertising in them, or

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<sup>3</sup> See, *Detroit Newspapers*, 330 NLRB No. 81 (2000)

<sup>4</sup> There has been prior lengthy litigation relating to this strike. The Board's finding that the strikers were unfair labor practice strikers was reversed by the D.C. Circuit in *Detroit Typographical Union No. 18 v. NLRB*, 216 F. 3d 109 (D.C. Cir. 2000). A separate proceeding, currently pending on appeal with the Board, was held before Administrative Law Judge Richard A. Scully to determine whether some 121 disciplinary actions by the three employers relating to the strike constituted conduct violative of Section 8(a)(3) and (1) of the Act. See, *Detroit Newspapers*, JD-164-99 (12/17/99)

<sup>5</sup> Judge Scully found, in case JD-164-99, that the Respondent unlawfully discharged Manoleas for a picket line related incident occurring on August 29, 1996.

serving as their news sources. McGruder testified that: he had seen Manoleas at bargaining sessions; that since the Unions' unconditional offer to return to work he had seen Manoleas engage in occasional picketing at the Respondent's facility; and that he was aware of the Unions ongoing boycott of the newspapers.

The current dispute involves allegations by Respondent photographer Mary Schroeder that on June 9 Manoleas and others interfered with and blocked her as she working on a photo assignment at the at the Detroit Metro Airport (the Airport). Schroeder has worked for the Respondent since 1979, and has held a variety of positions relating to photography. During 1999, as well as at the time of the hearing, Schroeder alternated as a photographer and assignments editor. Schroeder testified that as assignments editor she directed a staff of 17 employees. Schroeder also testified that her position was within Guild Local 22's bargaining unit, and that she participated in the newspaper strike as a striker for a period of time until she crossed the picket line and returned to work.<sup>6</sup> In June 1999, Schroeder reported to Robert Kozloff, the director of photography.<sup>7</sup> Schroeder testified that as a photographer she had a background in covering controversial settings, including labor disputes. Schroeder credibly testified that she did not participate in making the photography assignments on June 9.

#### *B. The June 9 picketing at the Detroit Metro Airport*

There was a rally at the Airport on June 9 organized by Teamsters Local 2000 in support of the Northwest Airlines flight attendants, who were involved in a contract dispute with their employer.<sup>8</sup> General Counsel witness Teamster International Representative Kevin Moore attended the June 9 rally. Moore credibly testified that the rally included a march of about 100 yards from the direction of a Marriott hotel to the Northwest terminal. The march, attended by around 150 people, took place on a sidewalk about 15 feet in width running by and between the two buildings.

Manoleas participated in the June 9 Airport rally. Manoleas' credited testimony revealed that: He learned of the rally from Teamster International Representative Jim St. Louis, a former newspaper striker and a coordinator for the Workers Justice Committee (WJC). Manoleas is a member of the WJC which is composed of former newspaper strikers and members of the six Unions involved in the continuing newspaper boycott. It was Manoleas' understanding that the June 9 rally was to support the Northwest Airlines flight attendants in their contract dispute.

Manoleas arrived at the Airport around 11 a.m. on June 9 and he began talking to WJC members Diane Valko and Mike Youngmeier. Both of whom had worked for the DNA and had participated in the newspaper strike.<sup>9</sup> After talking to Valko and Youngmeier, Manoleas walked towards the Marriott hotel where the rally was supposed to start.

Schroeder testified as follows: She was assigned to photograph the flight attendant's

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<sup>6</sup> There was no contention at this proceeding that Schroeder was a statutory supervisor. Manoleas testified that Schroeder went on strike for 4 or 5 months before returning to work.

<sup>7</sup> The Respondent admits that Kozloff is a statutory supervisor.

<sup>8</sup> Three of the six Unions that participated in the newspaper strike were affiliated with the Teamsters. However, Teamster Local 2000 was not one of the striking unions.

<sup>9</sup> The DNA had discharged Valko and Youngmeier for alleged strike misconduct conduct pertaining to the same August 29, 1996, incident for which the Respondent had previously discharged Manoleas. The discharges of all the employees who participated in this incident were found to be unlawful by Judge Scully.

rally and she brought two cameras on June 9, one with a long lens for distance and another with a short lens. The long lens camera allowed Schroeder to take a full bodied shot from about 30 to 40 feet away and take pictures of peoples faces with clarity from 20 to 30 yards away. On arriving at the Airport, Schroeder parked in the garage across from the Northwest terminal, walked across a skywalk to the terminal and exited the terminal around 11:30 a.m. where she saw Manoleas with four other people.<sup>10</sup> Schroeder then walked on the sidewalk past the Marriott hotel to a Channel 7 news truck.<sup>11</sup> Schroeder inquired but the Channel 7 employees did not know the direction from which the rally was to originate. Schroeder credibly testified that while standing by the news truck, she heard Manoleas say, "Scab! You don't belong here. What are you doing here? We don't want you to cover this. There is a Free Press scab." Manoleas and the four people he was with made these comments.<sup>12</sup>

Schroeder then left the news truck and headed on the sidewalk past the hotel in the direction of the Northwest terminal. At around 11:45 a.m., she sat on a bench near the Marriott hotel but between it and the Northwest terminal.<sup>13</sup> Schroeder credibly testified that, at that point, Manoleas came up to her and said, "Mary, nothing personal, but we really don't want you here. Why don't you go away. This is a Teamster action." Schroeder responded that she had a First Amendment right to be there. Manoleas stated, "But you're not welcome here." Schroeder asked what about Pat Beck? Manoleas stated that, "We would do the same thing to her."<sup>14</sup>

Schroeder's credited testimony reveals that after Manoleas left the bench area, Valko came up to Schroeder stating that Schroeder was not welcome and asking her to leave. Schroeder responded that she had a First Amendment right to be there. Schroeder identified her first two pictures of her shoot at the rally and testified that they were taken of Valko at close range with Schroeder's short lens camera. Schroeder took the pictures although she testified that Valko told her not to take her picture.<sup>15</sup> Schroeder explained, during her testimony, that she was on public ground and she had a right to take the pictures.<sup>16</sup>

<sup>10</sup> I found Schroeder, including consideration of demeanor, to be a reliable witness as to the events on June 9. Schroeder's testimony where in conflict, except when otherwise specified, has been credited over that of General Counsel witnesses Manoleas and Moore for reasons discussed here and in the credibility section of this decision.

<sup>11</sup> On June 10 Schroeder drew a diagram relating to the rally showing that the news truck was on the far side of the Marriott hotel from the Northwest terminal.

<sup>12</sup> Manoleas testified that he saw Schroeder by a television news truck and that "I remember saying something like that's a scab photographer from the Detroit Free Press."

<sup>13</sup> Schroeder's diagram shows that the bench was much closer to the hotel.

<sup>14</sup> Beck was a photographer reinstated by the Respondent after the Unions' unconditional offer to return to work. Manoleas testified that he approached Schroeder at the bench and said, "Listen, Mary, don't take it personally, but you know we are going protest anyone from the Free Press as long as the labor dispute continues." Manoleas confirmed that, during the conversation, he stated that they would even protest Beck's appearance.

<sup>15</sup> Schroeder did not know Valko by name, but Manoleas, during his testimony, identified Valko from a picture Schroeder had taken at the rally. There is no evidence that Valko participated in the blocking incident that followed after she first approached Schroeder.

<sup>16</sup> General Counsel witness Valko testified that: Valko heard people yelling scab and she saw Schroeder sitting on a bench. Valko called Schroeder a scab and said "... we don't want you here taking our pictures." Schroeder responded "oh, yeah, and started clicking her camera." Valko then walked back to the Northwest terminal. Around half way to the terminal, Valko saw a Wayne County sheriff parked in a marked car. While there were some minor

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The pictures of Valko were taken in the direction of the Marriott hotel and they show people on the sidewalk marching in the rally heading towards the sidewalk area where Schroeder was located. Manoleas can be seen in the distance in these pictures along with other marchers heading towards Schroeder. Manoleas had his arms raised in the pictures and according to Schroeder's credited testimony, she heard Manoleas shouting to the flight attendants that, "There is a scab up there, don't let her take your picture. Turn your head." Schroeder then switched to her long lens camera to photograph the marchers. She took one picture with the long lens camera which clearly showed Manoleas and several marchers. The other marchers had their heads turned, which Schroeder attributed to Manoleas' instructions. Schroeder testified that, before the start of the rally, she thought that the rally would be coming from the Northwest terminal and that she originally positioned herself at the benches near the hotel in the hope that she would not have to get close to the marchers. Schroeder testified that she was taken by surprise when the march came from the direction of the hotel.<sup>17</sup>

Similar to Schroeder, Manoleas testified that when he next saw Schroeder she was taking pictures after the march had started. Manoleas was with people from the WJC who were participating in the march. Manoleas testified that on seeing Schroeder, he said, "there's a scab photographer from the Free Press." He testified that "I started shouting scab and no scab papers." Manoleas stated that he was the first person to make these statements but that others joined in. He also testified that he was walking towards Schroeder and he estimated that he was 10 to 20 feet away from Schroeder when he first yelled scab. Manoleas testified that, "I wasn't leading anybody." However, he also initially stated, "I think that other people walked toward her, too." He then testified as follows:

JUDGE FINE: And you don't remember if anybody was walking with you?  
THE WITNESS: Not exactly, no.

Schroeder credibly testified that: Manoleas came up to within 3 feet of Schroeder, and that Manoleas along with another employee from the newspaper strike proceeded to surround her with their hands up in an effort to block her from taking pictures.<sup>18</sup> Schroeder tried to move to do her job, but they continued to block her. While Schroeder would normally take pictures with the camera up to her eye, her next shot (R. Exh. 7) was taken with the camera down because she was being blocked. Schroeder's next shot (R. Exh. 8) is an attempt to photograph the flight attendants. However, the picture shows three long fingers extending in front of the camera blocking the picture. Schroeder identified the fingers as part of Manoleas' hand, although the rest of his body did not appear in the picture. Schroeder's next picture (R. Exh. 9) was a direct picture of Manoleas. Schroeder had raised the camera to her eye and Manoleas had his hands extended between himself and Schroeder. The inside of Manoleas' hands in the picture, directly under each of his fingers except his thumb, contained a yellowish brown mark.<sup>19</sup> Schroeder's next shot (R. Exh. 10) appears to be an attempt to photograph marchers in the rally. However, the picture is blocked by a hand that Schroeder credibly testified belonged to Manoleas. Aside from his hand, Manoleas was not in the picture. However, the hand in the

disagreements between Valko and Schroeder's testimony, based on considerations of demeanor, I have found no basis to not credit Schroeder's version of the conversation.

<sup>17</sup> Schroeder's assignment read, "Northwest's flight attendants...will conduct informational picketing between noon and 3 p.m. This will be at the main terminal at the airport..."

<sup>18</sup> While the other employee raised his hands, Schroeder testified that it was mainly Manoleas who was placing his hands in front of her camera.

<sup>19</sup> Manoleas, during his testimony, attributed these markings on his hands to his doing pull-ups. Manoleas had the same marks on his hands at the time of the hearing.

picture contained the same distinct yellowish brown markings that were exhibited on Manoleas' hand in R. Exh. 9. Schroeder's credited testimony revealed that Manoleas' hand came within three inches of her camera lens at the time she took this picture (R. Exh. 10). Schroeder credibly testified that her next shot (R. Exh. 11) was blocked out because Manoleas had placed his hand over her camera lens and that he was actually touching her camera, which was to her face. Schroeder testified she found Manoleas touching her camera to be very objectionable causing her to remove the camera from her face and she started to back away.

Manoleas testified as follows: He approached Schroeder and he shouted scab, and said "no scab papers." Manoleas stopped in front of Schroeder about 3 to 5 feet away from her. Manoleas could not say how many other people also stopped in front of Schroeder, although at some point other striking newspaper employees stopped with him. Once he stopped, Manoleas again called Schroeder a scab, said no scab papers, and "You're not wanted here, scab." Schroeder responded by trying to take people's pictures including Manoleas' picture. Manoleas testified that he said, "I don't want you to take my picture." "I held my hands up." Concerning his holding his hands up, Manoleas testified as follows:

JUDGE FINE: How close did your hands get to her?

THE WITNESS: It still would have been a few feet away.

JUDGE FINE: Okay, so --

THE WITNESS: My hands did not get close to her.

JUDGE FINE: And your hands were about two feet apart from her?

THE WITNESS: I don't know. I don't know if it was even that close.

JUDGE FINE: So, you really can't give us an estimate as to how close your hands got to her?

THE WITNESS: I'm trying to visualize it. I was holding up trying to, you know block it. It would be a couple of feet away from the camera lens.

I do not credit this aspect of Manoleas' testimony. Rather, I find that as Schroeder testified, as corroborated by her pictures, that at one point Manoleas hand came within 3 inches of her camera and at another point his hand touched and in fact covered her camera lens. I also have credited Schroeder's testimony that when Manoleas approached her he used his hand and tried to block her from taking pictures before she took a direct shot of Manoleas, apart from the earlier pictures in which she captured him as part of the march.

Manoleas testified that: The people who stopped with him were shouting scab, no scab papers, and "don't take our pictures." At one point there were more than 20 people shouting scab and no scab papers, but this included people walking by as part of the march which came within a few feet of the incident with Schroeder. Manoleas was the first person to walk up to Schroeder and then others followed when they realized that she was a "scab photographer." Schroeder stated that she had a right to take pictures and Manoleas and others said that "We have the right to march and picket."

Schroeder credibly testified that: Schroeder took 15 more pictures at the rally. The picture marked R. Exh. 16 contained a man in a blue plaid shirt, who Manoleas identified as Dwight Bechler, a newspaper striker. Schroeder did not know where Manoleas was when she took the picture shown in R. Exh. 16. Between taking photographs R. Exh. 16 and R. Exh. 17, another picture of Bechler, Bechler called Schroeder a scab and then spit at her. The spittle missed and hit the ground next to Schroeder. Bechler told Schroeder not to take his picture. Schroeder took picture R. Exh. 18 within 5 seconds of taking R. Exh. 17. The picture in R. Exh.

18 contains a picture of Manoleas' hand, which was 5 inches from Schroeder's camera lens, although the remainder of Manoleas was not in the picture.<sup>20</sup> Rather, Manoleas' hand was blocking another shot of Bechler. Manoleas was a little over an arm's length away from Schroeder when the Bechler spit at her, but Schroeder did not know if Manoleas was in a position to see Bechler spit.<sup>21</sup> Manoleas also interjected his hand in front of Schroeder's lens during picture R. Exh. 25, which was her second to last shot of the event. Schroeder's credited testimony revealed that around 15 minutes elapsed between the time that she took her first and last picture at the rally. On taking her last picture, Schroeder left the area. Schroeder was not blocked from leaving and no one followed her. Schroeder phoned her office to report that she probably would not have any pictures to satisfy her assignment. The paper in fact used none of her pictures.

Schroeder testified that she has had many photo assignments when the subjects were not cooperative. When asked if she needed to stay apart from the event that she was photographing, Schroeder's response was "Very much." Schroeder also testified that she had developed techniques of taking pictures anonymously, including stepping away from the crowd. Schroeder testified that she took all of her pictures of the Airport rally on the sidewalk where the rally occurred and she admitted that she became enmeshed in the demonstration. However, when asked if she availed herself to an alternative location to photograph the rally, Schroeder's response was, "Well, why should I?" Schroeder testified that she considered herself to be on public property. Schroeder testified that rally began around noon and she left around 12:15 or 12:20 p.m. Schroeder only took one photo of the demonstration using her long lens camera.

Schroeder testified that she left the rally when she did because, "I feared that ...some more incidents would ... happen if I would stay and I did not want to become the brunt of it anymore." Schroeder later testified that as she was leaving, "they were watching me as I was going to the garage and even from across the street. I was afraid I was going to be called -- yelled scab all the way across the street."<sup>22</sup> However, Schroeder denied that she left the rally because she had been called a scab stating that she had been called scab many times. Schroeder testified that she left because Manoleas touched her camera and because she was not able to do her job.

I have concluded that Manoleas' and the protesters stopped near Schroeder for 10 minutes or more in an effort to block her from taking pictures. In this regard, Schroeder credibly testified that she spent around 15 minutes between her first and last pictures at the rally and that she was around 40 feet from the Marriott hotel at the time she took her initial pictures. These pictures show Manoleas in front of the hotel with his arms raised heading towards Schroeder (R. Exhs. 5 and 6). Schroeder testified that Manoleas was yelling about her presence at the rally when she took these pictures, and Manoleas testified that he was around 20 feet from Schroeder when he started yelling scab. Manoleas was near the front of the marchers when the first picture was taken, and I have concluded that the protesters approached Schroeder shortly after she started to take pictures. I therefore do not credit Manoleas' testimony that he only stopped in front of Schroeder for a couple of minutes.<sup>23</sup> I also note that

<sup>20</sup> Schroeder credibly identified the hand as belonging to Manoleas and it also contained the distinct yellow brownish pull-up markings.

<sup>21</sup> Manoleas testified that he did not see anyone spit at Schroeder.

<sup>22</sup> I do not credit Manoleas testimony that when Schroeder walked away he did not pay much attention to where she went. I find it highly unlikely that Manoleas, the instigator of the protest, would not have watched Schroeder to ensure that she left.

<sup>23</sup> Similarly, I have concluded that General Counsel witness Moore underestimated the time

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Schroeder's testimony revealed Manoleas attempted to block her 4th picture of the event as well as her 22nd picture, which was the second to last picture, and that he attempted to block certain other pictures in between. The pictures also show that the newspaper protesters were near Schroeder during the course of her picture taking activity.

When asked if he planned the incident with Schroeder, Manoleas testified that, "I went up to her and started calling her a scab and people joined in." Manoleas testified that he did not tell other people that he was going to stop in front of Schroeder, although he did tell people that "There's a scab from the Detroit Free Press." He testified that, "I thought it was quite obvious ... people were going to call her a scab and let her know that she was not wanted." Manoleas testified that there were around 15 to 20 WJC members at the rally, and he named four of them in addition to himself who were in Schroeder's pictures of the event. Manoleas testified that he protested Schroeder's presence at the rally to let people know that there was an ongoing labor dispute and a boycott of the newspapers by the six Unions that had gone on strike.

Moore testified as follows concerning the incident with Schroeder: Moore saw around six people standing about 3 feet from Schroeder yelling that they did not want her around. Moore joined the group. The people were, "putting their hands up to block her from shooting." At one point a man yelled "Don't take my picture."<sup>24</sup> Schroeder shoved the camera in the man's (Belcher's ) face and continued to photograph him. Schroeder had her arms fully extended and the camera was about 5 inches from Bechler's face.<sup>25</sup> Moore saw Manoleas near Schroeder. Manoleas was doing what everyone else did, he put his hands up and told Schroeder that he did not want her there. Moore testified that he did not see Manoleas touch Schroeder or verbally or physically threaten her. Moore testified that the march lasted around 5 to 8 minutes after Schroeder left, and that the speeches after the march lasted around 15 minutes. Moore testified that there were Wayne County Sheriffs present at the rally.

### *C. The Decision to Discharge Manoleas*

Schroeder returned to the newspaper on June 9. She processed the film and gave it to Kozloff, her supervisor. She testified that she told Kozloff that she had the worst day of her life, that she was assaulted at the Airport, and that she wanted to go home. On June 9, Kozloff wrote an inter office computer message to Carol D. Hutton, the Respondent's managing editor, concerning the Airport incident. The message was copied to McGruder, the executive editor, who read it on June 9. The message stated in pertinent part:

Need to talk to you today about a horrible strike-related incident. Mary was really shaken up out at the airport covering an information picket for the flight attendants today.

Chris Menolias (SP???) saw her and alerted everyone there that she was from the Free Press. They got in her face and there was a lot of screaming. One person even spat on her, we have his picture. Chris also blocked her camera several times, telling her she can't be there.

of the incident when he testified that it lasted around 5 minutes.

<sup>24</sup> While Moore did not know the man's name, he pointed him out in Schroeder's pictures as the individual who Manoleas later identified as Bechler.

<sup>25</sup> Moore testified that he was about 4 to 5 feet behind Bechler when Schroeder put the camera in his face. Moore testified that he could see between the two individuals but that he did not see Bechler do anything with respect to Schroeder.



McGruder responded to Kozloff on June 9 by another computer message stating that he had talked to labor relations, and he asked for a copy of the referenced picture and any other pictures that might be helpful. McGruder also requested a write up of the incident from Schroeder. McGruder testified that he had called labor relations and spoke to Kelleher, the vice-president of labor relations at the DNA, about the incident.

Schroeder spoke to McGruder on June 10. Schroeder testified that she told McGruder that she would never cover any union again, stating, "They are my brothers and sisters, I don't think so. If somebody presents a union card to me at any point, I will burn it in their face." McGruder testified that during this conversation, Schroeder also told him that while she was at the Airport filming the flight attendants picketing, Manoleas and others confronted her and one person spit at her. Schroeder stated that Manoleas blocked her efforts to take pictures, that he was threatening and intimidating, he approached her, put his hands in front of her camera and made it impossible for her to complete the photo assignment.<sup>26</sup> McGruder told her to prepare a report about the incident.

Schroeder prepared a memo on the incident on June 10, as well as a diagram of the Airport, and Kozloff selected five of the 23 pictures that she had taken of the event to attach to the memo, all of which were delivered to McGruder.<sup>27</sup> Schroeder's written memo states that she was scheduled to cover the flight attendants informational picket from noon to 3 p.m. It also reads, in pertinent part, that:

I arrived at the airport at 11:35 and went to the bus stop to wait for them to start.

Behind the bus stop, (A) I noticed a group of five people with t-shirts saying no scab papers and pro union.<sup>28</sup> I decided to walk to the Channel 7 van (B) on the other side of the hotel to see what information they had. The cameraman said he heard it was still scheduled to start at noon. As I'm turning to leave, I hear Chris Manoleas' voice with three others saying, "scab, who's that scab? You're not welcome here, scabby? So, whose job did you take?" I stayed at the van telling the cameraman I might be in trouble. I keep my back to them and they eventually leave.

I then walk back past the hotel and sit on one of the benches to wait for the flight attendants (C). A gray haired, mustache, skinny, 5'8" man came up to me and said, "So, scab, whose job did you take?" I asked him if he worked for the paper, and he said he was locked out. He said I wasn't wanted here and to leave. Chris Manoleas then came up to me and said that this was nothing personal but it was aimed at the company.

A Line of 75 flight attendants, two abreast, start to come down the sidewalk. At (D), Chris Manoleas was in the front saying in a very loud voice to the lead attendant, there's a scab photographer from the Free Press who shouldn't be here. Between the front of the line and me there are about five other people trying to block me from taking a long lens picture.

As the line approaches me (C), Chris and another man get within two feet of me and start raising their hands to block my pictures. With the wide angle, I keep shooting pictures. They and the flight attendants are yelling scab and get out of here, you're not

<sup>26</sup> While Schroeder did not report this portion of the conversation during her testimony, I credited McGruder's testimony that it occurred as he related it. I have made this finding based on considerations of McGruder's demeanor, as well as the fact that I find it highly unlikely that they would not have discussed the specifics of the incident that had taken place the day before.

<sup>27</sup> The five pictures attached to the memo were in black and white, while the final copies of the 23 pictures were printed in color.

<sup>28</sup> The letter references in the memo such as "(A)" refer to Schroeder's Airport diagram.

welcome and blowing whistles. A man in a plaid shirt spits at me. I gradually start walking away to get out of there.<sup>29</sup>

McGruder testified that he relied on Schroeder's statement of what happened as well as his prior experience with Manoleas in deciding to discharge him. In this regard, McGruder testified that: Manoleas had a history of very aggressive and confrontational behavior with the Respondent's employees and its customers. McGruder found it consistent with this behavior that Manoleas was confrontational with Schroeder. McGruder reviewed the packet of five pictures of the incident prepared by Kozloff, Schroeder's written report of the incident, and Manoleas' personnel file in deciding to discharge Manoleas. McGruder identified a memo dated March 17, 1993, reporting that McGruder had suspended Manoleas for one month from using company cars because Manoleas had bumped two cars while trying to park one of the Respondent's cars in front of the DNA building. According to the memo, after bumping the cars, Manoleas was reported to have gotten into an argument with one of the occupants who reportedly threatened to sue the Respondent over the incident. McGruder also reviewed another document dated July 13, 1995, which was a letter to the DNA security department. The letter was written by a staff member and contained an explanation of a confrontation between its author and Manoleas occurring on July 12, 1995. The letter described a heated exchange between the participants over their views of the pending labor dispute, working conditions at the newspapers, and contained a complaint about Manoleas' conduct. McGruder testified that after he received Schroeder's written report concerning the incident, he spoke about Manoleas with Heath Meriwether, the publisher of the newspaper, with Hutton, with John Taylor, the attorney with labor relations at DNA, and with Marshall Anstandig, a Knight-Ridder labor attorney.

McGruder testified that he made the decision to discharge Manoleas because it was clear that he had threatened, intimidated, and blocked efforts by one of the Respondent's employees to take photographs and to complete an assignment of getting pictures of the flight attendants. McGruder testified that it was his understanding that Manoleas was not allowed to do that if the employee was in the process of doing their work and that Manoleas actions violated a settlement agreement with the Unions thereby making Manoleas subject to disciplinary action. McGruder testified that photographers when performing their job should try to avoid being enmeshed in the actual event and that before he discharged Manoleas, McGruder was not aware that Schroeder had taken 25 photos of the rally.

McGruder testified that while he had reviewed the two memos in Manoleas' file concerning the March 17, 1993, and the July 12, 1995, incidents that without Manoleas' June 9 conduct, Manoleas would not have been discharged. McGruder testified that the prior incident reports just lent credibility to Schroeder's report of Manoleas' conduct on June 9. McGruder testified that, if he had not read the two prior incident reports concerning Manoleas, "Oh, I actually would have fired him. I still believed what Mary Schroeder had said to me. I still believed the pictures that I saw. His previous conduct, to me, added credibility for Ms. Schroeder's statements."

McGruder sent Manoleas a letter dated July 16, 1999. It read in pertinent part:

By letter dated September 24, 1996, you were previously informed of your discharge from the Detroit Free Press because of picket line misconduct.

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<sup>29</sup> Schroeder testified that she knew that at least four or five people at the rally were related to the newspaper strike.

It has since come to my attention that on June 9, 1999, at Metro Airport you harassed, threatened, interfered with and tried to intimidate a Detroit Free Press photographer as she tried to perform her lawful and appropriate work duties and exercise her rights under Section 7 of the National Labor Relations Act. In addition, your conduct violates the terms of a National Labor Relations Board settlement agreement, which prohibits such behavior.

Your conduct on June 9 will not be tolerated and constitutes separate and distinct grounds for you dismissal. In the unlikely event you were ever reinstated in the future relating back to the September 24, 1996, termination, you are hereby notified of your dismissal today.<sup>30</sup>

#### *D. Credibility*

The General Counsel presented three witnesses who testified about the June 9 Airport incident, while the Respondent relies on Schroeder's testimony as to the events on that day. Valko and Schroeder are largely in agreement that Valko protested Schroeder's presence at the rally, and that Schroeder took Valko's picture over Valko's objection. Schroeder testified that she did not see a Wayne County sheriff's car at the rally, while Valko testified that she saw such a car as she was leaving the area where she verbally confronted Schroeder.<sup>31</sup> I found both witnesses to be credible as to this aspect of their testimony and do not find their testimony to inconsistent. The events concerning the rally happened quickly and Schroeder was occupied by the various confrontations that she was engaged in and by her efforts to photograph the picketers. I do not find it improbable for Schroeder not to have noticed the sheriff's car which did not show up clearly on any of her pictures, although I have concluded that Valko credibly testified that the car was there.

As to the events at the rally, there is a dispute between the testimony proffered by Moore and Manoleas and that of Schroeder. Where the witnesses testimony is in conflict, I found Schroeder to be the more credible of the witnesses. Schroeder, although clearly aligned with the Respondent's cause in that she sat as the Respondent's counsel table, testified in a credible and straight forward fashion as to the specific incidents as they occurred and her testimony was corroborated by the photographs she took at the event. She also made concessions in her testimony including admissions that Bechler's spittle hit the ground rather than hitting her and that Schroeder became enmeshed in the rally, although this went against her training as a photographer. Schroeder was argumentative at times and I do not believe that she was ever blocked from leaving the rally if she chose to do so although at one point when it was pointed out that she was enmeshed in the rally she replied, "I couldn't get out." In this regard, she was also asked why she did not take pictures from another location, and her somewhat inconsistent response was, "Well, why should I?" While Schroeder may have engaged in some puffing in support of her actions, I do not find that this impacted on her ability to specifically and accurately report the events as they occurred, and based on considerations of demeanor I have credited her testimony as set forth above.

On the other hand, I was not similarly impressed with Moore or Manoleas' testimony.

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<sup>30</sup> The Respondent submitted the referenced settlement agreement into evidence in this proceeding. McGruder testified that the Respondent did not file any charges with the Board concerning an alleged breach of the settlement, and did not attempt to initiate contempt proceedings over it.

<sup>31</sup> Moore also testified that he saw Wayne County sheriffs present at the event.

Moore admitted that certain aspects of his memory were not good concerning the rally and he noted he had attended over 80 such rally's. Moreover, I do not credit Moore's testimony that Schroeder extended her arms and took Bechler's photo within 5 inches of his face. This testimony was undermined by Schroeder's actual photos of Bechler which were clearly from a greater distance away. Moore also failed to state that Schroeder was sitting at the Respondent's counsel table when he was asked to describe her on cross-examination and in fact he testified that he had not seen her since the June 9 rally although she was sitting in front of him. While I credit Moore's claim that he attended the June 9 rally and that he witnessed the protest of Schroeder's presence there, I have concluded that his memory of the event was poor, and I credit Schroeder's testimony over his in all areas where there was a conflict.

I also found Manoleas' testimony on occasion to be less than forth coming. It was difficult to obtain information from Manoleas, and I have concluded that his memory of the event was worse than it should have been or that it was intentionally poor. He repeatedly qualified his answers with terms like "I believe" and "I think." As to his poor memory, when he was asked where the march started, Manoleas stated, "I can't really remember." When asked if he was the only person who stopped in front of Schroeder, Manoleas replied, "I don't think so." He also could not say how many people had stopped. Manoleas also refused to acknowledge that certain pictures of hands attempting to block Schroeder's picture taking were his hands. For instance, when he was asked by counsel for Guild Local 22, if the picture in R. Exh. 10 and by myself whether the picture in R. Exh. 18, contained pictures of his hand, Manoleas testified that he did not know. He did this although the pictures of the hands in question contained the unusual brownish yellow pull-up markings that were on his hands in another picture at the event which showed his face (R. Exh. 9) and although he testified that the markings in R. Exh. 9 could have been caused by a pull-up bar that he had been using on and off for years. Moreover, aside from the pull-up markings, Manoleas' hands had a distinctive look to them. Since I have concluded based on the evidence before me, including Schroeder's credible testimony, that Manoleas' hands were in R. Exh. 10 and R. Exh. 18, as part of his efforts to block Schroeder, I do not credit his testimony that he did not recognize them or that he could not recall placing them there as they were depicted in the pictures.

As set forth above, I have concluded that Manoleas repeatedly attempted to block Schroeder's efforts to photograph the event as she credibly testified, that his hands came within 5 inches of her camera lens, and at one point his hand touched her camera while it was up to her face and actually covered the camera lens. In making the conclusions, I have considered the fact that Schroeder's June 10 written report of the incident did not state that Manoleas touched her camera. However, Schroeder credibly testified that the June 10 memo was just a "very brief version" of what had transpired on June 9. I do not find that any omissions from Schroeder's June 10 memo are sufficient to undercut her detailed and credible testimony at the hearing which was supported by her contemporaneous photographs of the incident. Schroeder's June 10 memo contains the following remarks, "As the line approaches me (C), Chris and another man get within two feet of me and start raising their hands to block my pictures." Moreover, on June 9, Kozloff copied McGruder a memo based on Schroeder's description of the incident which stated:

Chris Menolias (SP???) saw her and alerted everyone there that she was from the Free Press. They got in her face and there was a lot of screaming. One person even spat on her, we have his picture. Chris also blocked her camera several times, telling her she can't be there.

I have concluded that both of these statements referring to efforts by Manoleas to block Schroeder's filming are consistent with her testimony at the hearing that at one point in doing so

Manoleas actually used his hands to cover her camera lens. For its had long been held that even when a witness omits facts from a Board affidavit, these omissions do not necessarily constitute grounds for impeachment. See, *Bethlehem Temple Learning Center, Inc.*, 330 NLRB No. 166, (2000), *Jd. slip op. at 7*; *Norman King Electric*, 324 NLRB 1077, 1083 (1997) *enfd.* 177 F.3d 430 (6th Cir. 1999), and *Redway Carriers*, 274 NLRB 1359, 1371 (1985).

### *E. Analysis and Conclusions*

There is a dispute between the parties as to the appropriate legal standard with which to evaluate Manoleas' July 1999 discharge. The General Counsel and the Charging Party assert that the proper standard is set forth by the Board in *Alto-Shaam, Inc.*, 307 NLRB 1466 (1992), *enfd.* 996 F.2d 1219 (7th Cir. 1993), for employees who have had a prior unlawful discharge, but that at a minimum the standard set forth in *Clear Pine Mouldings*, 268 NLRB 1044 (1984), *enfd.* 765 F.2d 148 (9th Cir. 1985), *cert. denied* 474 U.S. 1105 (1986) should apply for cases involving alleged picket line misconduct. The Respondent contends that the standard set forth in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir., 1981), *cert. denied* 455 U.S. 989 (1982), involving the usual burdens of proof for employees allegedly unlawfully discharged should apply.

I have concluded that the *Wright Line* analysis is not appropriate for evaluating the lawfulness of the Respondent's July 1999 discharge of Manoleas. In *E.W. Grobbel Sons*, 322 NLRB 304, 304 (1996), *revd. on other grounds*, 149 F.3d 1183 (6th Cir. 1998) (unpublished), the Board stated that the *Wright Line* analysis is not the correct standard to apply "for determining whether an employer has violated the Act by discharging an employee for alleged misconduct arising out protected activity...". In *E.W. Grobbel Sons*, *supra.*, the Board cited the Supreme Court's decision in *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964), as setting forth the standard for evaluating misconduct in the course of protected activity and noted that the Court cited therein with approval the Board's decision in *Rubin Bros. Footwear*, 99 NLRB 610 (1952), *enf. denied on other grounds* 203 F. 2d 486 (5th Cir. 1953), where the Board set forth the burdens of proof in striker misconduct cases. Along these lines, in *Consumers Power Co.*, 282 NLRB 130, 132 (1986), the Board held that:

The protections Section 7 affords would be meaningless were we not to take into account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses. Thus, when an employee is discharged for conduct that is part of the res gestae of protected activities, the relevant question is whether the conduct is so egregious as to take it outside the protection of the Act, or of such character as to render the employee unfit for further service.

In *George A. Hormel and Co. v. NLRB*, (CA DC 1992), 962 F.2d 1061, 1064, the court stated that:

As a rule, an employee who supports a boycott of his employer's product violates his duty of loyalty to the employer. See, e.g., *id.* at 472-77, 74 S.Ct. at 176-79; *Sahara Datsun*, 278 N.L.R.B. 1044, 1046 (1986); *Patterson-Sargent Co.*, 115 N.L.R.B. 1627, 1630 (1956). There is an exception to that rule, however: supporting a boycott is protected § 7 activity if it (1) is related to an ongoing labor dispute and (2) does not disparage the employer's product. See, e.g., *Sierra Publishing Co. v. NLRB*, 889 F.2d 210, 216 (9th Cir. 1989); *Coors Container Co. v. NLRB*, 628 F.2d 1283, 1287 (10th Cir. 1980); *Community Hosp. v. NLRB*, 538 F.2d 607, 610 (4th Cir. 1976); *Emarco, Inc.*, 284 N.L.R.B. 832, 833 (1987); *Allied Aviation Serv. Co.*, 248 N.L.R.B. 229, 230, *enf'd* 636

F.2d 1210 (3d Cir. 1980).

I have concluded that Manoleas was engaged in activity protected by Section 7 of the Act during his protest of the presence of the Respondent's photographer at the June 9 Airport rally. Manoleas was a participant in a six Union strike against the Respondent, the DNA, and the News beginning in July 1995. The labor dispute did not end after the Unions February 1997 unconditional offer to return to work in that the parties did not reach a contract and Manoleas, among other strikers in attendance at the June 9 rally, had not been recalled to work. In fact some of those who attended the rally, including Manoleas, were subsequently found to have been unlawfully discharged by one of the three struck employers by another administrative law judge for alleged picket line misconduct during the strike. As a result of the ongoing labor dispute, the WJC was formed by the once striking Unions and they continued to engage in picketing as well as a boycott of the newspapers. McGruder, the Respondent's official who made the decision to discharge Manoleas, was aware of the boycott and he had seen Manoleas and others picketing at the Respondent's facility.

On June 9, Manoleas and several other former newspaper strikers attended the Airport rally in support of Northwest flight attendants in their contract dispute with the airline. The rally drew the attention of the local media and Schroeder, a photographer employed by the Respondent who had crossed the picket line during the newspaper strike, was assigned to photograph the rally.<sup>32</sup> Manoleas, as well as other ex-newspaper strikers, informed Schroeder at the rally that her presence was not welcome, told her to leave, called her a scab, and told her that they did not want her to take their pictures. Manoleas also asked the marching flight attendants to turn their heads as Schroeder was attempting to photograph them. I have concluded that all this conduct was activity protected by Section 7 of the Act in that it was in furtherance of a declared boycott by the former striking Unions as a result of an ongoing labor dispute with the Respondent and the other two employers. The conduct also did not disparage the Respondent's product. Had Manoleas' conduct at the rally stopped here his discharge for engaging in such conduct would have been unlawful. However, since Manoleas engaged in certain blocking conduct during the course of his protected activity, I have concluded based on the case law set forth above that the standards set forth in *Wright Line, supra.*, are not the appropriate means to determine whether Manoleas exceeded the bounds of permissible conduct during his protected activity and whether he was lawfully discharged.

I have also concluded that *Alto-Shaam, Inc., supra.*, does not require, in the circumstances here, that the lawfulness of Manoleas' July 16, 1999, discharge be evaluated by standards other than those set forth in *Clear Pine Mouldings, supra.* In *Alto-Shaam, Inc., supra.*, at 1467, the Board stated the following concerning an unlawfully discharged striker who engaged in misconduct subsequent to her unlawful discharge:

We agree with the judge that as of her discharge on July 3, Peckstein was a discriminatorily discharged employee eligible for reinstatement with backpay. The judge correctly held that the *Clear Pine Mouldings* standard for reinstatement of employees accused of strike misconduct does not apply to the alleged misconduct of strikers after they have been discriminatorily discharged. We also agree with the judge that

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<sup>32</sup> Counsel for the General Counsel stated at the hearing that there is no contention that Schroeder's photographing the rally which was held to draw attention to the flight attendant's dispute was unlawful. In fact, counsel for the General Counsel state at page 16 of their post-hearing brief that Schroeder was correct in her assertion that she had a First Amendment right to take photographs at the rally.

Peckstein's visit to Held's home for the purposes stated was protected, concerted activity. Further, we agree with the judge that Peckstein's closing remark--"Well, if you valued your life"--reasonably may be interpreted as a threat of physical harm if Held continued to cross the picket line. Finally, we agree with the judge that the Respondent's purported discharge of Peckstein on July 13 was not a discharge or termination but, rather, a refusal to reinstate. Thus, the issue correctly posed by the judge was whether Peckstein should be denied the usual remedies of reinstatement with backpay by virtue of her conduct during the July 6 visit with Held. The judge concluded that Peckstein's conduct was not so outrageous as to render her unfit for employment. Here we part company with the judge.

In determining whether backpay and reinstatement are appropriate remedies where discriminatees engaged in subsequent misconduct, the Board "looks to the nature of the misconduct and denies reinstatement in those flagrant cases 'in which the misconduct is violent or of such character as to render the employees unfit for further service.'" *C-Town*, 281 NLRB 458 (1986), quoting *J. W. Microelectronics Corp.*, 259 NLRB 327 (1981). The Board takes into account whether the misconduct was an "emotional reaction" to the employer's own unlawful discrimination against the employee. *Blue Jeans Corp.*, 170 NLRB 1425 (1968), citing *NLRB v. M & B Headwear Co.*, 349 F.2d 170, 174 (4th Cir. 1965).

The Respondent argues in its post-hearing brief that the standard set forth in *Alto-Shaam, Inc.*, supra., should not apply in this case because "First, *Alto-Shaam* only applies where the initial discharge involved disparate treatment-a fact not present here. Second, *Alto-Shaam* only applies where the misconduct leading to the second discharge was an emotional reaction to the first discharge - a fact also not present here." (R. Brief at 13). Contrary to these assertions, the language quoted above from the *Alto-Shaam, Inc.*, decision suggests that the only requirement for the application of that standard is for the involved employee to have been previously unlawfully discharged by an employer. For example, the Board employed the standard set forth in *Alto-Shaam* in that case to evaluate an employee's second termination, although the Board specifically noted that the threat taking place 3 days after the initial discharge could not be considered the type of emotional reaction that would not warrant the forfeiture of the discriminatee's right to reinstatement. Similarly, in *C-Town*, supra., a case cited in *Alto-Shaam, Inc.*, supra, the Board applied the standard used in *Alto-Shaam* to determine whether an employee should be denied reinstatement for a racial slur made subsequent to the employees' initial discharge although the unlawfulness of the initial discharge was not premised on disparate treatment. Rather, the reasons advanced for the initial discharge were found to be pretextual. See also, *Hadco Aluminum & Metal Corp.*, 331 NLRB No. 69 (2000), where the standard used in *Alto-Shaam, Inc.*, was used to determine if employee Wright should forfeit backpay for post-discharge conduct although there was no evidence presented that Wright had been discriminated against vis-a-vis the treatment of other employees concerning his initial unlawful discharge.

However, the Respondent correctly points out that the Board in applying the *Alto-Shaam, Inc.*, standard will take into consideration the timing of an employee's post-discharge conduct to determine whether it is a result of an emotional outburst provoked by the employee's initial unlawful discharge. Thus, in *Alto-Shaam, Inc.*, threatening conduct to another employee 3 days after an employee's discharge was found sufficient to terminate the employee's reinstatement rights, while conduct of a similar nature in *Blue Jeans Corp.*, supra., occurring right after the employee was informed of their discharge was found to constitute an emotional outburst caused by the respondent's unfair labor practices and not sufficient to bar the discriminatee's right to reinstatement. See also, *C-Town*, supra., where an employees use of a

racial slur one day after their discharge and on seeing their replacement was also found to be provoked by the Respondent's unfair labor practices.

In the instant case, Manoleas conduct on June 9, occurred almost three years after his September 24, 1996, discharge and it cannot be said to constitute an emotional outburst resulting from the prior termination. Moreover, in *Alto-Shaam, Inc.*, supra., at 1467, the Board stated that the following standard was appropriate for evaluating post-discharge misconduct in that the Board would deny reinstatement in those flagrant cases "'in which the misconduct is violent or of such character as to render the employees unfit for further service.'" However, the Board has used similar language to evaluate an employee's initial discharge where the employee is discharged for conduct engaged in during the course of their protected activity. See, *Consumers Power Co.*, 282 NLRB 130, 132 (1986) where the Board held that "when an employee is discharged for conduct that is part of the res gestae of protected activities, the relevant question is whether the conduct is so egregious as to take it outside the protection of the Act, or of such character as to render the employee unfit for further service."<sup>33</sup> Based on the forgoing, I have concluded that the standard used by the Board in *Alto-Shaam, Inc.*, supra., for evaluating post-discharge conduct as a bar to reinstatement is similar to that used in traditional cases where an employee is discharged for conduct engaged in during the course of protected activities, except in those circumstances where the timing of the employee's action reveals that it is an emotional outburst provoked by the employer's unfair labor practices.

For the reasons stated above, I have concluded that Manoleas was engaged in protected activity on June 9. However, his conduct took place during picketing and it involved his efforts to block one of the Respondent's employees from completing her assignment. In these circumstances, I have concluded that the *Clear Pine Mouldings*, supra., standard designed for evaluating picket line and other strike related misconduct is appropriate for determining whether Manoleas' conduct rendered him unfit for future service. In this regard, employees engaged in lawful strikes are engaged in protected activity and the Board has used the *Clear Pine Mouldings* criteria to determine whether in the course of such activity they have committed acts that would require a forfeiture of their recall rights.

The *Clear Pine Mouldings* standard is ordinarily applied to employees who are actively on strike at the time of their alleged misconduct and the Unions here had made an unconditional offer to return to work pre-dating the June 9 Airport incident. However, several factors in addition to the fact that Manoleas' actions were picket line related convince me that reliance on the framework applied for striker misconduct is warranted. First, despite the Union's unconditional offer to return work, Manoleas had not been recalled and therefore he was an unreinstated and possibly unlawfully discharged economic striker. The Respondent also treated Manoleas' July 16 discharge as if it was related to the strike. Kozloff's June 9 memo reporting the incident to McGruder stated, "Need to talk to you today about a horrible strike-related incident." Moreover, McGruder's July 16 discharge letter to Manoleas references his prior September 1996 discharge for "picket line misconduct" and asserts that Manoleas' June 9 conduct "violates the terms of a National Labor Relations Board settlement agreement, which prohibits such behavior." The Respondent entered the referenced settlement agreement in

<sup>33</sup> See also, *J. W. Microelectronics Corporation*, 259 NLRB 327, 328 (1981), enf'd. 688 F.2d 823 (3rd Cir. 1982), where the Board concluded that discriminatee Johnson was discharged for her participation in protected activities and that the respondent's claim that she was discharged for her racial remarks was pretextual. The Board also concluded that although the racial remarks were made, "we do not consider her conduct so egregious as to render her unfit for further service..."



evidence in these proceedings and by its terms it clearly relates to alleged misconduct that occurred during the course of the strike. Thus, the Respondent treated Manoleas June 9 activity as if it were strike misconduct and I have concluded that the *Clear Pine Mouldings* test supra., as it has been applied in cases of alleged strike misconduct is an appropriate one with which to evaluate Manoleas July 16 discharge.<sup>34</sup>

In *Eller Media Co.*, 326 NLRB 1287, 1292 (1998), enfd., 203 F.3d 53 (D.C. Cir. 1999), the following principles were set forth concerning the reinstatement rights of striking employees:

"Section 7 of the Act gives employees the right to peacefully strike, picket, and engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." *Clear Pine Mouldings, Inc.*, 268 NLRB 1044, 1045 (1984). However, "striking employees may disqualify themselves from reinstatement by engaging in serious misconduct." *Matlock Truck Body & Trailer Corp.*, 248 NLRB 461, 472 (1980). In all cases involving either the discharge of or the refusal to reinstate strikers for having engaged in such alleged acts of misconduct while picketing, "the burden of proving discrimination is that of the General Counsel." *Rubin Bros. Footwear, Inc.*, 99 NLRB 610, 611 (1952). In this regard, the General Counsel must initially establish that the alleged discriminatee was, in fact, a striker and that his employer took some action (against) him for conduct while said employee engaged in the concerted work stoppage. At this point, the burden shifts to the respondent which must prove that it entertained an honest belief that the striking individual has engaged in misconduct based upon record evidence linking specific persons to specific acts of misconduct. *General Telephone Co. of Michigan*, 251 NLRB 737, 739 (1980). Such constitutes an adequate defense to a charge that the alleged discriminatee's discharge or the refusal to reinstate said individual was violative of the Act except where the General Counsel next affirmatively establishes that the employee did not, in fact, engage in the asserted misconduct or that it was not so flagrant or egregious so as to warrant discharge or denial of reinstatement. *National Gypsum Co.*, 302 NLRB 534, 539-40 (1991); *Ornamental Iron Work Co.*, 295 NLRB 473, 478 (1989). *Desert Inn Country Club & Spa*, 275 NLRB 790, 795 (1985); *Newport News Shipbuilding & Drydock*, 265 NLRB 716 (1982). Once the General Counsel has established that the misconduct did not occur, the burden shifts to the respondent to rebut the denials. *Laredo Coca-Cola Bottling Co.*, 258 NLRB 491, 496 (1981). Finally, in determining whether a striking employee's picket line misconduct is sufficiently serious to justify an employer's refusal to reinstate him, the Board applies an objective test: "whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." *Clear Pine Mouldings, Inc.*, supra at 1046.<sup>35</sup>

Whether an employer maintains an "honest belief" that an employee engaged in such misconduct can be based on hearsay sources such as reports of security guards, nonstriking employees or supervisors. *Clougherty Packing Co.*, 292 NLRB 1139, 1142 (1989); *Newport Shipbuilding*, 265 NLRB 716, 718 (1982) enfd. in relevant part 738 F. 2d 1404 (4th Cir. 1984); and *General Telephone Co. of Michigan*, supra at 739. The employer is not required to obtain

<sup>34</sup> In *Detroit Newspapers*, JD-164-99, (12/17/99) Slip op. at 6-7, and 15, Judge Scully similarly rejected the contention that the standard for strike misconduct should not apply for strike related discipline to employees following the Unions' unconditional offer to return to work.

<sup>35</sup> These principles also apply to misconduct directed at non-employees such as supervisors. See, *General Chemical Corp.*, 290 NLRB 76, 82 (1988); and *PBA, Inc.*, 270 NLRB 998 (1984).

the striker's side of events before administering disciplinary action, in particular when it relies on accounts of persons who witnessed the misconduct. See, *Giddings & Lewis, Inc.*, 240 NLRB 441, 448 (1979); and *Associated Grocers of New England*, 227 NLRB 1200, 1207. (1977) enfd. in part, remanded in part, 562 F.2d 1333 (1st Cir. 1977)

5 I have concluded that Manoleas, an unreinstated former striker, was engaged in protected activity related to the strike and continuing labor dispute at the Airport on June 9, and that the Respondent was aware that he was engaged in such activity. Therefore the General Counsel has met the initial burden required to establish that Manoleas was unlawfully  
10 discharged. I have also concluded that the Respondent has met its burden of establishing an "honest belief" that Manoleas engaged in misconduct during the event. McGruder credibly testified that it was his decision to terminate Manoleas. McGruder met with Schroeder on June 10, and she told him that she was at the Airport filming the flight attendants when Manoleas and others confronted her, and one person spit at her. McGruder was told that Manoleas blocked  
15 Schroeder's efforts to take pictures, that he was threatening and intimidating when he approached her, that he put his hands in front of her camera and made it impossible to complete her photo assignment. McGruder requested and received a written report from Schroeder describing the incident as well as relevant pictures from Kozloff. In the report, Schroeder states that, near the outset of the shoot, she heard Manoleas with three others  
20 saying, "scab, who's that scab? You're not welcome here, scabby?" Schroeder stated in her statement that a line of 75 flight attendants started coming down the sidewalk with Manoleas in front "saying in a very loud voice to the lead attendant, there's a scab photographer from the Free Press who shouldn't be here. Between the front of the line and me there are about five other people trying to block me from taking a long lens picture." Schroeder went on to state that  
25 as the line approached her Manoleas and another man got within two feet of her and raised their hands to block her pictures. The report continued that the two men and the flight attendants were yelling scab get out of here and a man in a plaid shirt spit at her. The five pictures McGruder reviewed of the event include a clean shot of Manoleas, and another of him standing directly in front of Schroeder with his hands raised in front of her camera. Based on  
30 the forgoing, I have concluded that McGruder had a "honest belief" that Manoleas engaged in strike related misconduct at the time he decided to discharge him. See, *Clougherty Packing Co.*, supra., *Newport Shipbuilding*, supra., and *General Telephone Co. of Michigan*, supra.

35 In order to establish that Manoleas discharge was unlawful, the General Counsel must affirmatively establish that that Manoleas did not engage in the asserted misconduct or that it was not so flagrant or egregious so as to warrant discharge or denial of reinstatement, or as set forth in *Alto-Shaam, Inc.*, supra., to render Manoleas unfit for future service. McGruder testified that he made the decision to discharge Manoleas because it was clear that he had threatened, intimidated, and blocked efforts by one of the Respondent's employees to take photographs and  
40 to complete her assignment.<sup>36</sup> McGruder wrote in his July 16 termination letter to Manoleas that "on June 9, 1999 at Metro Airport you harassed, threatened, interfered with and tried to

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45 <sup>36</sup> McGruder testified that he reviewed Manoleas' personnel file before deciding to discharge him and that the file contained two prior incident reports relating to alleged aggressive behavior. McGruder testified that, in his view, these reports lent credence to Schroeder's description of events on June 9. However, McGruder also credibly testified that, absent these reports, he would have discharged Manoleas based on the June 9 incident alone in that he believed Schroeder. I do not find McGruder's review of Manoleas' file tainted McGruder's discharge decision. In fact, McGruder's failure to review the file of a long term employee before deciding to discharge him, particularly if the file showed a positive work record, could lend credence to the contention the discharge was unlawfully motivated.

intimidate a Detroit Free Press photographer as she tried to perform her lawful and appropriate work duties and exercise her rights under Section 7 of the National Labor Relations Act. In addition, your conduct violates the terms of a National Labor Relations Board settlement agreement, which prohibits such behavior. These were the only reasons advanced in the letter for Manoleas' discharge.<sup>37</sup>

<sup>37</sup> I do not find, as the Respondent contends in its brief, that "McGruder also had a good faith basis for believing that Manoleas had 'actively cooperated' with Bechler, the individual who spit at Schroeder." First, McGruder never testified that he had decided to discharge Manoleas based on Bechler's actions. Rather, McGruder's testimony concerning the discharge decision and his termination letter to Manoleas only referenced Manoleas' conduct and McGruder did not mention the spitting incident. Moreover, while McGruder was told that Schroeder was spit at during the protest, he was not told that Manoleas witnessed individual spit, or otherwise encouraged or condoned his conduct. Therefore, I do not find that the Respondent has established that McGruder had an "honest belief" or "good faith basis" to believe that Manoleas actively cooperated with Bechler at the time he spit at Schroeder. The "mere fact that an employee was in the company of another employee who commits an act of misconduct will not taint the first employee without a showing of complicity on the part of that employee in the wrongful activity." *MP Industries, Inc.*, 227 NLRB 1709, 1710 (1977). In reaching this conclusion, I have considered Schroeder's credited testimony that Manoleas was in the area when Bechler spit at her and that immediately thereafter Manoleas used to his hand to block one of the pictures she attempted to take of Bechler. However, this picture was not given to McGruder who testified that he only reviewed the five pictures attached to Schroeder's June 10 memo, and there was no evidence that he was otherwise provided this information before he issued the July 16 discharge letter. While Schroeder's testimony was more specific at the hearing, the Respondent cannot rely on testimony given in the year 2000 to bootstrap support that it had a "honest belief" of culpability on the part of Manoleas for Bechler's actions for a decision it made in July 1999. Schroeder also testified that she did not know if Manoleas saw Bechler spit, and Manoleas denied seeing him do so. I have credited Manoleas testimony that he did not discuss with other people that he was going to stop in front of Schroeder and therefore I have concluded that he did not participate in any plan for anyone to spit at her. I have also concluded that Manoleas was in the area and that he did try to block Schroeder from taking Bechler's picture immediately after Bechler spit at her. However, Schroeder and Moore's testimony reveals that Bechler told Schroeder not to take his picture. Hearing this remark, it is also likely that Manoleas would have tried to block Schroeder from taking pictures of Bechler as he had done with other people at the rally although there was no claim that they spit at her. For the reasons set forth above, I did not find much of Manoleas' testimony concerning his description of his actions during the June 9 incident worthy of belief. While there is no direct evidence that Manoleas saw Bechler spit, the timing of his attempt to block the picture is suspect. Had the Respondent established that it had an "honest belief" at the time of the discharge that Manoleas condoned Bechler's spitting by his attempt to shield Bechler from Schroeder's camera, the burden would have shifted to the General Counsel to establish that Manoleas did not engage in this conduct. I would have then concluded that the General Counsel failed to meet this burden of proof. In this regard, I am unable to conclude that Manoleas was not aware that Bechler spit at Schroeder at the time he attempted to shield him by blocking Schroeder's camera based on Manoleas' testimony alone. However, I have concluded that the Respondent cannot hold Manoleas accountable for Bechler's conduct here in defense of its discharge decision because the Respondent failed to establish that it had an "honest belief" that Manoleas planned, acted in concert, or otherwise condoned Bechler's actions at the time that McGruder made the decision to discharge Manoleas.

I agree with counsel for the General Counsel's assertion at page 29 of their brief that, "The instant case is analogous to those involving picket line blocking of entrances." The Board has found that picketing with a purpose to prevent or impede access to a jobsite can restrain or coerce employees, even if the actual delay is of short duration because employees are restrained in their right to not join a strike or assist a labor organization. See *Shopmen's Local Union No. 455*, 243 NLRB 340, 346 (1979), holding that blocking an entrance or an exit even for a short period of time constitutes restraint and coercion within the meaning of Section 8(b)(1)(A) of the Act. There about 10 pickets detained a truck for several minutes, until policemen who were at the scene could break up the congregation of strikers. See also, *Carpenters (Reeves, Inc.)*, 281 NLRB 493, 498 (1986), and *Metal Polishers Buffers, Int'l Local 67*, 200 NLRB 335, 336 (1972). However, the Board has also held that the brief stopping of employees which is only incidental to non-coercive picketing even in mass picketing does not constitute conduct that coerces or restrains employees. See, *Ornamental Iron Work Co.*, 295 NLRB 473 (1989), enf'd. 935 F.2d 270 (6th Cir. 1991); *Interstate Cigar Co.*, 256 NLRB 496, 497-498, fn. 3 (1981); and *Coronet Casuals, Inc.*, 207 NLRB 304, 305.

In *Big Horn Coal Co.*, 309 NLRB 255 (1992), it was found that the respondent had lawfully discharged 17 strikers who had blocked access to one of its gates on one occasion during a 9 month strike. The gate had been locked by a non company lock, and the strikers engaged in mass picketing along with their family members. The company received notice that the gate had been locked and its convoy of trucks arrived there at around 6:45 a.m. of the day in question. The sheriff, who was at the scene, was told that the strikers would not let the trucks through, and at 9 a.m. the trucks left to try another gate. The respondent's discharge of the 17 employees who it clearly identified as participating in the blocking conduct was found to be lawful by the judge and upheld by the Board. The judge noted that:

...whether the strikers engaged in mass picketing and blocking ingress is clearly proven by the video tapes and photographs..., and the fact the strikers told the sheriff that they would not let the convoy containing nonstriking employees and supervisory personnel enter. There are other persuasive factors. The pickets carried signs stating, and yelled on numerous occasions, "Scabs go home." They also yelled repeatedly "No contract, no work."...After 9:01 a.m. ...after the convoy had turned around and started to leave, a picket is heard to say, "We won, victory, even if they go in the back way, we still one."

As noted by the judge with Board approval in *Big Horn Coal Co.*, supra, at 258, in *Tube Craft*, 287 NLRB 491, 492 (1987), the Board stated that, "The plurality Board opinion in *Clear Pine Mouldings*. . . . stated that peaceful picketing does not include the right to block access to the employer's premises. 268 NLRB at 1047." It was stated in *Big Horn Coal Co.*, supra at 258 that:

In *Metal Polishers Local 67*, 200 NLRB 335 (1972), the driver of a vehicle drove away after being blocked by a picket for 2 or 3 minutes. The trial examiner concluded that 'a delay of one to five minutes under peaceful circumstances hardly constitutes blocking or barring ingress so as to constitute a violation of the Act.' In reversing the trial examiner, the Board stated:

Such a construction is at variance with established Board law. (Citations omitted.)

Section 7 of the Act guarantees to all employees the right to refrain from participating in union activities, including strikes. Clearly, by physically blocking access to the plant of cars in which nonstriking employees and other persons were seeking to enter the gates, Respondent has interfered with the nonstriking

employees in their exercise of these rights. (Citations omitted.)

I have concluded that under the standards set forth in *Eller Media Co.*, 326 NLRB 1287, enfd., 203 F.3d 53 (D.C. Cir. 1999) relating to strike misconduct cases and in *Alto-Shaam, Inc.*, 307 NLRB 1466 (1992), enfd. 996 F.2d 1219 (7th Cir. 1993), relating to post-discharge conduct, the General Counsel has failed to establish that Manoleas did not engage in the asserted misconduct or that it was not so flagrant or egregious so as to render him unfit for future service or denial of reinstatement. The credited evidence shows that on seeing Schroeder on June 9, by the Channel 7 news truck, Manoleas called her a scab, and stated "There is a Free Press scab" and that "We don't want you to cover this." Schroeder then moved to a bench near the Marriott hotel and Manoleas again approached her and stated, "we really don't want you here. Why don't you just go away." When the march started for the rally, Manoleas raised his arms and shouted to the flight attendants in the march that, "There is a scab up there, don't let her take your picture, Turn your head." Manoleas testified that he was the first one to call Schroeder a scab, but others joined in. Schroeder's testimony revealed Manoleas came within 3 feet of her and that he used his hands to block Schroeder from photographing the rally. Manoleas hands came within 3 inches of Schroeder's camera lens and at another point his hand actually covered her camera lens. Schroeder tried to move to complete her assignment but her efforts were to no avail. Manoleas testified that he was the first person to walk up to Schroeder then others joined him. He testified that he thought that it was "quite obvious...people were going to call her a scab and let her know that she was not wanted." Manoleas testified that once he stopped in front of Schroeder, he again called Schroeder a scab, said no scab papers, and that "You're not wanted here, scab." Manoleas testified that people stopped with him shouting the same thing, including "don't take our pictures." He testified that at one point that, including marchers, there as many as 20 people shouting scab and no scab papers. Schroeder's testimony revealed that this conduct by Manoleas and others who joined his actions continued for what I have concluded to be at least 10 minutes and that it prevented Schroeder from effectively photographing the event. Schroeder left shortly after an individual spit at her and Manoleas continued to use his hands to block Schroeder's picture taking. Moore testified that there were six people standing around 3 feet from Schroeder, yelling that they did not want her around, and "putting up there hands to block her from shooting."

Manoleas statements to Schroeder show that it was his intent to prevent her from carrying out her assignment, and I have concluded that his actions in physically blocking Schroeder were not just incidental conduct to otherwise peaceful picketing. By engaging in this activity, Manoleas interfered with Schroeder's right to refrain from participation in union activities. I find that Manoleas' conduct was of the nature that would tend to coerce or intimidate employees in the exercise of rights protected by the Act and that his participation in such conduct rendered him unfit for future service with the Respondent.

Cases cited by the General Counsel do not warrant a different result. In *Ornamental Iron Work Co.*, supra., employees stood in front of a truck as it attempted to enter the respondent's facility. However, the truck driver testified that he had been previously instructed by his employer that if he encountered any difficulty it was arranged that the police would escort him into the facility. He testified that when he pulled up to the front gate the strikers merely asked if he would honor the picket, and he pulled back and waited for the police to come. It was concluded in that case that, "the instantaneous blockage on the part" of the strikers "was solely to gain the attention of the driver in order for them peaceably to deliver their message, and hence represented conduct for which they could not be discharged." id. at 480. In *Cal Spas*, 322 NLRB 41, 62 (1996), enfd. in relevant part, 150 F. 3d 1095 (9th Cir 1998), the Board held that a video tape of one day of a strike showing two striking employees standing in front of cars

driven by nonstriking employees and impeding their access to the employees parking lot was insufficient to warrant their discharge. In the present case, Manoleas' repeated statements to Schroeder followed by his conduct reveal that he engaged in more than incidental blocking, but rather it was his intent to prevent Schroeder from completing her assignment.

I also do not find persuasive the General Counsel's contentions that Schroeder was in part to blame for Manoleas' actions by her photographing the event at close range. I have credited Schroeder's testimony that she attempted to station herself at a location where she could photograph the rally at a distance and that she was surprised that the march originated from the hotel near where she was located. Once Schroeder saw that the march had started, Manoleas, along with the other protesters, were quickly upon her blocking her efforts to photograph the event. Schroeder had also been repeatedly told by Manoleas and others that they did not want her there and Manoleas' actions in blocking her lent credence to these taunts. Schroeder credibly testified that the protesters watched her as she left the rally. Given these circumstances, I do not believe that it was incumbent on Schroeder to find another location at a more distant vantage point to make another attempt to photograph the event as the General Counsel contends. The facts also do not bare out the General Counsel's assertion that Schroeder gave up on the assignment merely because she was called a scab. Rather, Schroeder was repeatedly called a scab before the blocking incident, but remained at the scene after these verbal attacks in an effort to complete her assignment. Schroeder also credibly testified she had been called a scab many times in the past as a result of her crossing the picket line during the strike. It was only when Schroeder determined that she could not complete the assignment as a result of the blocking of her efforts that she left. Finally, even if I were to conclude, which I do not, that Schroeder had carelessly set up at an ill advised location to her take pictures, this did not give Manoleas license to physically block her efforts to perform her work.<sup>38</sup>

In *Alto-Shaam, Inc.*, supra., the Board held that the respondent had unlawfully discharged employee Peckstein on July 3, 1990. Peckstein thereafter engaged in misconduct on July 6, 1990, which the Board concluded was of sufficient severity to forfeit her reinstatement rights. The respondent issued Peckstein a discharge letter dated July 13, 1990, based on the July 6 incident. The Board held that the letter was not a discharge letter, but rather it was a refusal to reinstate. Moreover, although the letter did not issue until July 13, the Board held that by her conduct on July 6, Peckstein had rendered herself unfit for further service and had forfeited her right to reinstatement and backpay after July 6. I have found that based on his conduct on June 9, 1999, Manoleas has rendered himself unfit for further service and has forfeited his right to reinstatement and backpay after that date should Judge Scully's decision be upheld that he was previously unlawfully discharged for the incident on August 29, 1996. Accordingly, the complaint is dismissed.

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<sup>38</sup> During the hearing, the Charging Party attempted to introduce evidence concerning discipline applied by the News to its employee and non-striker Susan Stark in an effort to establish disparate treatment on the part of the Respondent towards Manoleas. McGruder credibly testified that he did not take into account the incident in which Stark was involved in deciding to discharge Manoleas. I have also credited his testimony that it was he who made the decision to discharge Manoleas. The incident involving Stark was litigated before Judge Scully and he concluded that it did not have application for allegations of disparate treatment beyond employees of the News, that is it did not apply to employees of the Respondent or the DNA. See, *Detroit Newspapers*, JD-164-99 (12/17/99), JD. Slip op. at 127. The Charging Party also failed to establish based on the evidence before me that discipline for employees of the News should serve as a basis for disparate treatment for the Respondent's employees.

CONCLUSION OF LAW

The Respondent has not violated the Act in any manner encompassed by the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>39</sup>

ORDER

The complaint is dismissed.

Dated, Washington, D.C. February 15, 2001

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Eric M. Fine  
Administrative Law Judge

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<sup>39</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.